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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-167804

DATE: November 15, 1977

MATTER OF: Kenneth L. Nash - Annual leave benefits
as part-time employee

DIGEST: Immigration and Naturalization Service inspector whose position was designated "intermittent" is nonetheless entitled to annual leave benefits on a pro rata basis as a part-time employee having an established regular tour of duty since he was routinely issued a form scheduling his work at specific times and dates for each of the 2 workweeks of the next pay period. Under these circumstances, the fact that he may not have been scheduled to work at the same time and on corresponding days of the 2 workweeks of each pay period does not defeat that entitlement.

We have been asked to render a decision concerning Mr. Kenneth L. Nash's entitlement to annual leave for the period from May 27, 1975, to January 18, 1976, during which period he served as an Immigration and Naturalization Service (INS) inspector in San Juan, Puerto Rico.

Notwithstanding the designation of his position as "intermittent," Mr. Nash claims that he worked a regular tour of duty during the period in question and asserts that as a part-time employee subject to a regular tour of duty he is entitled to annual leave under chapter 63, subchapter I, of title 5 of the United States Code. In support of this contention, he cites the fact that he was granted annual leave subsequent to January 18, 1976, for work performed as an INS inspector in San Juan under the same conditions.

Effective January 18, 1976, administrative jurisdiction for INS employees in the San Juan District was transferred from the former Southeast Region, INS Office, to the Eastern Regional Office, INS. As of that same date, Mr. Nash's appointment was redesignated "part-time" and from then until his appointment was terminated, he was credited with annual leave as a part-time employee serving subject to an established tour of duty. The record contains a letter dated August 24, 1976, from the New York Region of the Civil Service Commission, indicating that upon a

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review of the records, personnel officials of the Eastern Region, INS, had determined that Mr. Nash, in fact worked a regular tour of duty established in advance without the knowledge of regional personnel officials.

For the period prior to January 18, 1976, the INS, Southern Region denied Mr. Nash's claim for crediting of annual leave based upon its finding that he did not have a regularly scheduled tour of duty but instead worked "various days and hours." This determination appears to have been based on a review of the documents effecting Mr. Nash's appointment, which designate his position as "intermittent," and a review of Time and Attendance reports which, for the pay periods involved, show that he worked (or was given time off for holidays) for the following nonovertime hours:

<u>Week</u> <u>Ending</u>	S	M	T	W	T	F	S	S	M	T	W	T	F	S
6- 7-75			8		8	8	8	8	8	8	8	8		8
6-21-75			8	8	8	8	8		7	8	8	8	8	8
7- 5-75	8	8			8	8			8	8	8	8	8	8
7-19-75	8		8		7	6	8	5		8	8	8	8	8
8- 2-75	8	8			8	8	3	7	8			8	8	
8-16-75	8		8			8	8	8		8	8	8	8	8
8-30-75	8	8	8			8	8	8	8	8			8	8
9-13-75	8	8	8			8	8		8	8	8	8	8	8
9-27-75	8	8	8	8	8	8		8	8	7	8	8		
10-25-75	8		8	8			8	8	8	8			8	8
11- 8-75	8	8	8			8		8	8	8	8	8	8	
12- 6-75	7	8	8	8				8	4	8				
1- 3-76	8		8	8			3		8			8		8
1-17-76	8	8			8	8	8	8	8		8	8	8	8

A part-time employee is entitled to annual and sick leave benefits under chapter 63, subchapter I, of title 5 of the United States Code on a pro rata basis unless he is subject to the following exclusion at 5 U.S.C. § 6301(2)(B)(ii) which provides as follows:

"(ii) a part-time employee who does not have an established regular tour of duty during the administrative workweek * * *."

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The Civil Service Commission instructions include the following provision at chapter 630, subchapter 3-1, of the Federal Personnel Manual (FPM) which is applicable to part-time employees and provides as follows:

"b. Earning rates for part-time employees.

(1) To earn annual leave, part-time employees must have a regularly assigned tour of duty on at least one day of each week in the pay period.

"(2) Part-time employees with less than three years of service earn one hour of annual leave for each 20 hours in a pay status.

"(3) Those with three but less than 15 years of service earn one hour of annual leave for each 13 hours in a pay status.

"(4) Those with 15 or more years of service earn one hour of annual leave for each 10 hours in a pay status."

This regulation stresses the requirement that a part-time employee serve under an established tour of duty as a condition to his right to receive annual leave benefits. In this regard, chapter 630, subchapter S2-3a(4) of FPM Supplement 990-2 further provides that:

"(4) Crediting of part-time accruals. To benefit from the leave law, a part-time employee must serve under an established tour of duty for each of the two administrative workweeks in each biweekly pay period. There is no credit of leave for fractional parts of biweekly pay periods either at the beginning or end of an employee's period of service. A part-time employee who completes a full biweekly pay period may carry over from one pay period to the next those hours of service in a pay status which do not equal the number necessary for a minimum leave credit of one hour until sufficient service is rendered to total the hourly credit; but if he changes to a full-time

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employee status and he has insufficient service credit to earn the minimum of one hour, the fractional hours of service are lost because of the change in the tour of duty (32 Comp. Gen. 490)."

The Southern Region, INS, has apparently construed the requirement that a part-time employee have an established regular tour of duty as contemplating that he be scheduled to work for corresponding days and hours of each workweek over an extended period of time. On April 26, 1977, INS reported to the Civil Service Commission that:

"Mr. Nash's Time and Attendance Reports for the period May 27, 1975 to January 17, 1976, reflect that he did work 40 or more hours a week on occasion, however, he did not have a regularly scheduled tour of duty, but worked various days and hours. Therefore, Mr. Nash's appointments were properly classified as Intermittent. * * *"

The fact that Mr. Nash's appointments were designated "intermittent" is not conclusive of the question of his entitlement to annual leave benefits. In B-183813, June 20, 1975, we upheld the granting of annual and sick leave to employees originally given intermittent appointments who in fact worked regularly scheduled tours of duty. In so holding, we stated:

"We have held that the wording of an employee's appointment does not necessarily determine his right to sick and annual leave if his actual service differs from that indicated in the appointment. 16 Comp. Gen. 442 (1936), 18 Comp. Gen. 457 (1938)."

See also 31 Comp. Gen. 215 (1951), and B-165791, October 12, 1970.

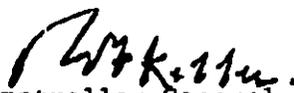
In 31 Comp. Gen. 581 (1952) we construed the requirement imposed by section 202(b)(1)(B) of the Annual and Sick Leave Act of 1951, 65 Stat. 679, that the employee have an established tour of duty as contemplating a "definite and certain time, day and or hour of any day, during the workweek when the employee regularly will be required to perform duty." In 32 Comp. Gen. 491 (1953),

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we amplified that definition, holding that a part-time employee is entitled to benefits under the leave act only if he serves under an established tour of duty for each of the 2 administrative workweeks in each biweekly pay period. The holdings of these two decisions are reflected in the Civil Service Commission instructions quoted above.

We have been advised by the then officer in charge of the United States Immigration and Naturalization Service Inspectional Facility at the San Juan International Airport, Puerto Rico, that during the period from May 27, 1975, through January 18, 1976, Mr. Nash's assignments were prescheduled on a biweekly basis. In this connection, we understand that Mr. Nash's supervisors followed a practice of issuing him a form designating the specific dates and times at which he was required to perform work during the 2 administrative workweeks for the following pay period. The fact that for each such pay period he may not have been scheduled to work at the same times and on corresponding days of the 2 workweeks is inconsequential where, as in Mr. Nash's case, he was in fact scheduled to work on at least 1 day of each administrative workweek within each of the pay periods in question. Cf. 54 Comp. Gen. 251 (1974).

Since Mr. Nash has been separated from his position as an INS inspector, he should be paid a lump-sum amount representing the leave that he should have been credited for the period from May 27, 1975, to January 18, 1976, insofar as otherwise proper.


Deputy Comptroller General
of the United States